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12 THE MIRAGE CASINO-HOTEL, LLC

13 UNITED STATES DISTRICT COURT

14 DISTRICT OF NEVADA

15 NICOLE HOULE,

16 Plaintiff,

vs.

17 THE MIRAGE CASINO-HOTEL LLC;
18 BAR TENDER'S UNION 165,

19 Defendants.

20 Case No. 2:17-cv-00258-GMN-GWF

21 DEFENDANT THE MIRAGE CASINO-
HOTEL, LLC'S MOTION TO DISMISS
22 PLAINTIFF'S FIRST AMENDED
COMPLAINT

23
24 Defendant, The Mirage Casino-Hotel, LLC (hereinafter referred to as "The Mirage"), hereby
moves to dismiss all claims asserted against it in Plaintiff's First Amended Complaint pursuant to
Federal Rule of Civil Procedure 12(b)(6) because Plaintiff's claims are barred by the availability of
an adequate statutory remedy. Moreover, Plaintiff failed to exhaust her administrative remedies with
respect to her claims alleging a hostile work environment and retaliation thereby subjecting the
claims to dismissal pursuant to Federal Rule of Civil Procedure 12(b)(1). This Motion is made and
based upon the following Memorandum of Points and Authorities, all pleadings and papers on file
herein, as well as any oral argument permitted by the Court.

25 **MEMORANDUM OF POINTS AND AUTHORITIES**

26 I. **BACKGROUND INFORMATION**

27 On February 6, 2017, Plaintiff filed a First Amended Complaint ("FAC") against The Mirage
28 and Bartenders Union Local 165 (hereinafter referred to as "the Union") alleging the following

1 causes of action: (1) sexual harassment/hostile work environment (against The Mirage); (2)
 2 retaliation (against The Mirage); (3) intentional infliction of emotional distress (against all
 3 defendants); (4) negligent supervision, training, and retention (against all defendants); and 5) breach
 4 of duty of representation (against the Union).¹ In her FAC, Plaintiff alleges that during her
 5 employment with The Mirage, she was subjected to and witnessed sexually inappropriate conduct
 6 directed towards and engaged in by her co-workers. (ECF No. 6 at ¶¶10-12). Plaintiff contends that
 7 such conduct created a hostile work environment. (ECF No. 6 at ¶¶47-48). Additionally, Plaintiff
 8 alleges that she reported the alleged conduct to The Mirage's Human Resources Department on
 9 multiple occasions which subsequently resulted in the suspension and eventual termination of four of
 10 her co-workers. (ECF No. 6 at ¶¶17-19, ¶24, ¶30, ¶32). Two of Plaintiff's co-workers (Lindsay
 11 Howard and Dariusz Nastal) who were terminated filed grievances which resulted in their
 12 reinstatement. (ECF No. 6 at ¶¶33-34). Plaintiff alleges that she was subjected to retaliation by
 13 Howard and Nastal following their reinstatement. (ECF No. 6 at ¶¶42-43).

14 In her FAC, Plaintiff fails to identify any statutory basis for her hostile work environment
 15 and retaliation claims. However, sexual harassment/hostile work environment and retaliation are
 16 unlawful employment practices prohibited by state and federal laws. Specifically, Title VII of the
 17 Civil Rights Act of 1964 ("Title VII") and NRS 613.330-613.340 prohibit such employment actions.
 18 Nevertheless, Plaintiff failed to file a charge of discrimination to exhaust her administrative remedies
 19 as required by statute. **Exhibit A (Declaration of Cindy Moehring in Support of Motion to**
 20 **Dismiss at ¶4).**² As a result, Plaintiff's first cause of action alleging sexual harassment/hostile work
 21 environment and second cause of action alleging retaliation must be dismissed due to her failure to

22 ¹ Plaintiff had previously filed a Complaint against The Mirage and the Union in the District Court for Clark County on
 23 November 2, 2016. On January 30, 2017, the Union removed this matter to this Court. (ECF No. 1). The Mirage
 24 subsequently joined in the Union's removal. (ECF No. 10).

25 ² The Ninth Circuit has held that material properly submitted with the complaint (i.e. exhibits under FRCP 10(c)) may be
 26 considered as part of the complaint for purposes of a Rule 12(b)(6) motion to dismiss. *Hal Roach Studios, Inc. v.*
Richard Feiner & Co., Inc., 896 F.2d 1542, 1555 (9th Cir. 1990); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994)
 27 (overruled on other grounds) (a defendant may attach to a Rule 12(b)(6) motion the documents referred to in the
 28 complaint to show that they do not support plaintiff's claim). Therefore, although a court's review of a Rule 12(b)(6)
 motion to dismiss is generally limited to the contents of the complaint, the court may also consider documents attached
 to the complaint, documents incorporated by reference in the complaint, or matters of judicial notice without converting
 the motion into a motion for summary judgment. *See Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir.
 1987). Plaintiff's FAC is absent of any assertion that she exhausted her administrative remedies as required by statute,
 which is separately confirmed by the Declaration of Cindy Moehring in Support of Motion to Dismiss.

1 exhaust her administrative remedies.

2 Furthermore, Plaintiff's third cause of action alleging intentional infliction of emotional
 3 distress ("IIED") and fourth cause of action alleging negligent supervision, training and retention are
 4 based solely upon the allegedly unlawful employment practices which serve the basis for Plaintiff's
 5 first and second causes of action. Specifically, Plaintiff's IIED claim is premised upon the alleged
 6 hostile work environment created by Nastal and alleged retaliation towards Plaintiff by Howard and
 7 Nastal. (ECF No. 6 at ¶62). Likewise, Plaintiff's negligent supervision, training and retention claim
 8 is premised upon the creation of an allegedly hostile work environment by Nastal and/or Howard as
 9 well as the alleged retaliation towards Plaintiff by Nastal and Howard. (ECF No. 6 at ¶¶68-70).
 10 Because Plaintiff's IIED and negligent supervision, training and retention claims are based upon the
 11 same alleged unlawful employment practices which serve the basis for her first and second claims,
 12 her IIED and negligent supervision, training and retention claims are barred by the availability of an
 13 adequate statutory remedy. Accordingly, Plaintiff's third and fourth causes of action should also be
 14 dismissed against The Mirage.

15 **II. LEGAL ARGUMENT**

16 **A. Standard for Dismissal**

17 **1. Rule 12(b)(1)**

18 Dismissal under Rule 12(b)(1) is appropriate where the Court lacks subject matter
 19 jurisdiction. A plaintiff must exhaust her administrative remedies for claims of harassment and
 20 retaliation in order for a court to obtain subject matter jurisdiction over those claims. *B.K.B. v. Maui*
Police Dept., 276 F.3d 1091, 1099 (9th Cir. 2002). Importantly, "a party invoking the federal
 21 court's jurisdiction has the burden of proving the actual existence of subject matter jurisdiction."
Thompson v. McCombe, 99 F.3d 352, 353 (9th Cir. 1996). In this case, Plaintiff's FAC is devoid of
 22 any factual assertion that she exhausted her administrative remedies with respect to her first and
 23 second causes of action. Therefore, the Court lacks subject matter jurisdiction over Plaintiff's claims
 24 for sexual harassment/hostile work environment and retaliation thereby warranting dismissal of
 25 those claims.

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2. Rule 12(b)(6)

Pursuant to Rule 12(b)(6), a party may move for dismissal for failure to state a claim for which relief may be granted. While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff is obligated to provide the grounds of his entitlement to relief which requires more than labels and conclusions-- and a formulaic recitation of the elements of a cause of action will not do. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). “Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)” *Id.* (citations omitted).

In *Ashcroft v. Iqbal*, the United States Supreme Court explained:

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citations omitted). The law is clear that “only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.* at 679 (citations omitted).

B. Plaintiff's Tort Claims Are Precluded by the Availability of An Adequate Statutory Remedy

In her FAC, Plaintiff asserts claims for hostile work environment, retaliation, IIED and negligent supervision, training and retention against The Mirage. Plaintiff fails to identify a statutory basis to support her claims for hostile work environment and retaliation. Therefore, it appears that Plaintiff is attempting to assert tort-like claims for a hostile work environment and retaliation. Such claims are not cognizable and are precluded by the availability of an adequate and comprehensive statutory remedy. Specifically, Title VII and Nevada law (NRS 613.330-613.340) prohibit the alleged employment practices which serve the basis for Plaintiff's first and second

1 causes of action against The Mirage. Accordingly, Plaintiff must proceed under either or both of
 2 those statutes in order to state viable claims for a hostile work environment and retaliation.

3 As this court recognized in *Brinkman v. Harrah's Operating Co., Inc.*, "N.R.S. § 613.330 *et*
 4 *seq.* provides the exclusive remedy for tort claims premised on illegal employment practices. The
 5 Nevada Supreme Court as well as the District Court for the District of Nevada have held that tort
 6 claims premised on discrimination in employment are remedied under the statute." *Brinkman v.*
 7 *Harrah's Operating Co., Inc.*, 2008 U.S. Dist. LEXIS 123992, at *5 (D. Nev. Oct. 16, 2008).

8 The Nevada Supreme Court has repeatedly rejected attempts to create tort remedies when an
 9 available statutory remedy exists. *See, Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 216 P.3d 788
 10 (2009) (refusing to recognize a common law claim when the plaintiff had an alternative remedy
 11 available to him under the federal Railway Labor Act); *Chavez v. Sievers*, 118 Nev. 288 (2002)
 12 (refusing to recognize a common law cause of action for employment discrimination when the
 13 employer was not statutorily covered by NRS 613.330 and Title VII); *Shoen v. Americo, Inc.*, 111
 14 Nev. 735, 744 (1995) (refusing to recognize a public policy tort based upon an employee's allegation
 15 that he was wrongfully terminated for testifying because a comprehensive statutory remedy existed
 16 in NRS 50.070); *Sands Regent v. Valgardson*, 105 Nev. 436, 439-40 (1989) (rejecting the plaintiff's
 17 attempt to expand the public policy exceptions to the at-will doctrine in order to include age
 18 discrimination because "the Legislature has addressed the gravity of violating Nevada's public
 19 policy against age discrimination by defining the extent of the remedy available to parties injured by
 20 such discrimination."). When an adequate statutory remedy exists, the Nevada Supreme Court has
 21 repeatedly and uniformly held that no additional court-created tort remedies under common law are
 22 available because it would be unfair to the defendant. *Ozawa*, 216 P.3d at 791 (citing *D'Angelo v.*
 23 *Gardner*, 107 Nev. 704, 720 (1991)). Therefore, Plaintiff's hostile work environment and retaliation
 24 claims fail and should be dismissed due to the availability of an adequate statutory remedy in Title
 25 VII and/or NRS Chapter 613.

26 Additionally, Plaintiff's IIED and negligent supervision, training and retention claims are
 27 premised upon exactly the same alleged conduct which serves the basis for her hostile work
 28 environment and retaliation claims. (ECF No. 6 at ¶62, ¶¶68-70). As noted above, NRS 613.330 et

seq. provides the exclusive remedy for tort claims premised upon illegal employment practices. *Brinkman*, 2008 U.S. Dist. LEXIS 123992, at *5 (dismissing claims for IIED and negligent supervision because NRS §613.330 provides the exclusive remedy for claims premised on illegal employment practices). This Court has repeatedly held that when tort claims are premised upon the same alleged illegal employment practices, such allegations do not give rise to a separate common law tort claim. *Schaefer v. Diamond Resorts Int'l Mktg.*, 2015 U.D. Dist. LEXIS 55511, at *17-18 (D. Nev. Apr. 28, 2015) (dismissing the plaintiff's IIED claim because it was based upon the same alleged illegal employment practices underlying her discrimination claims); *Jackson v. Universal Health Servs.*, 2014 U.S. Dist. LEXIS 129490 (D. Nev. Sept. 15, 2014) (dismissing the plaintiff's IIED and negligent training and supervision claims because they were based upon the same allegations of illegal racially discriminatory practices for which NRS 613.330 is the exclusive remedy). The law does not allow multiple bites of the apple based upon identical conduct by simply renaming causes of action. Therefore, Plaintiff's third and fourth causes of action fail as a matter of law and should be dismissed.

C. Plaintiff Failed To Exhaust Her Administrative Remedies

As explained above, a hostile work environment and retaliation are employment practices prohibited by Title VII and Nevada law (NRS 613.330-613.340). Both federal and state laws require that "plaintiffs must... exhaust their administrative remedies before seeking judicial relief from discriminatory action." *Brown v. Puget Sound Elec. Apprenticeship & Training Trust*, 732 F.2d 726, 729 (9th Cir. 1984); 42 U.S.C. § 2000e-5(e); *Pope v. Motel 6*, 114 P.3d 277 (Nev. 2005) (requiring timely exhaustion of administrative remedies through Nevada Equal Rights Commission); NRS 613.405; NRS 613.420. Because Plaintiff failed to exhaust her administrative remedies, her claims alleging unlawful employment practices (i.e., a hostile work environment and retaliation) against The Mirage are subject to dismissal. **Exhibit A.**

The requirement to exhaust administrative remedies mandates that a plaintiff file a timely charge with the United States Equal Employment Opportunity Commission ("EEOC") or the Nevada Equal Rights Commission ("NERC"), thereby allowing the agency time to investigate the charge. See 42 U.S.C. § 2000e-5(a) (empowering the EEOC to prevent unlawful employment practices

1 under Title VII); NRS 613.405 (empowering NERC to receive complaints of unlawful employment
 2 practices); NRS 233.157; *B.K.B.*, 276 F.3d at 1099 (“The administrative charge requirement serves
 3 the important purposes of giving the charged party notice of the claim and ‘narrowing the issues for
 4 prompt adjudication and decision.’”) (quoting *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 472
 5 (D.C. Cir. 1976)). Further, each discrete incident of discriminatory or retaliatory treatment
 6 constitutes its own unlawful employment practice for which administrative remedies must be
 7 exhausted. *See Nat'l Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 122 S.Ct. 2061 (2002).
 8 The court does not have subject matter jurisdiction over matters that fall outside the scope of a
 9 plaintiff’s charge of discrimination. *B.K.B.*, 276 F.3d at 1099; *see also, Sosa v. Hiraoka*, 920 F.2d
 10 1451, 1456 (9th Cir. 1990).

11 Here, Plaintiff’s FAC is completely devoid of any factual assertion that she filed a charge of
 12 discrimination with either the EEOC and/or NERC. Moreover, wholly absent from Plaintiff’s FAC
 13 is any factual assertion that she timely exhausted her administrative remedies with respect to her
 14 unlawful employment practice claims against The Mirage. Indeed, Plaintiff did not exhaust her
 15 administrative remedies. **Exhibit A.** Because Plaintiff failed to exhaust her administrative
 16 remedies, she is precluded from pursuing her hostile work environment and retaliation claims in
 17 court. *Vinieratos v. United States*, 939 F.2d 762, 769 (9th Cir. 1991) (exhaustion of administrative
 18 remedies is a statutory condition to suit under Title VII); *Dosier v. Miami Valley Broadcasting*
 19 *Corp.*, 656 F.2d 1295 (9th Cir. 1981). Accordingly, Plaintiff’s first and second causes of action fail
 20 for this additional reason and must be dismissed accordingly.

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1 **III. CONCLUSION**

2 For the reasons set forth above, The Mirage requests that this Court grant its Motion to
3 Dismiss thereby dismissing all claims asserted by Plaintiff against The Mirage.

4 Dated: February 14, 2017

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7 /s/Sandra Ketner
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